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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

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Clerk

NO. 124.

U. C. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,
Appellants and Plaintiffs in Error,

vs.

J. T. NELSON,
Appellee and Defendant in Error.

Appeal from and in Error to the Supreme Court of the Territory of Oklahoma.

BRIEF OF PLAINTIFF IN ERROR

FRANK DALE,
A. G. C. BIERER,
Attorneys for Appellants and Plaintiffs in Error.

THE STATE CAPITAL CO., GUTHRIE, OKLAHOMA.

IN THE

SUPREME COURT

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UNITED STATES.

OCTOBER TERM, 1905.

U. C. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,
Appellants and Plaintiffs in Error,
vs.
J. T. NELSON,
Appellee and Defendant in Error.

NO. 124

Appeal from and in Error to the Supreme Court of the Territory of Oklahoma.

STATEMENT OF FACTS.

On the 28th day of May, 1900, at the city of Guthrie, Logan County, Oklahoma Territory, J. T. Nelson as one party and U. C. Guss, W. H. Gray, J. W. McNeal and Frank H. Greer as the other parties, entered into the following contract: (p. 17.)

"Memorandum of agreement made and entered into this 28th day of May, 1900, to-wit, as follows: J. T. Nelson agrees on his part to

TERRITORY OF OKLAHOMA, }
LOGAN COUNTY. } ss:

Frank H. Greer, being first duly sworn, deposes and says that he is one of the appellants in the above entitled cause; that he has read and knows the contents of the above and foregoing motion and aplication, and the statement of fact therein contained are true.

FRANK H GREER.

Subscribed and sworn to before me this 14th day of January, 1905.

LIZZIE CANFIELD.

[SEAL] *Notary Public.*

Commission expires Aug. 22, 1908.

BRIEF IN SUPPORT OF MOTION FOR CERTIORARI AND DIMINUATION OF THE RECORD, AND FOR ORDER ON THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA TO MAKE A STATEMENT OF FACTS OF THE CASE IN THE NATURE OF A SPECIAL VERDICT.

A part of section 2 of the Act of April 7, 1874, Vol. 1, Supp. Rev. St. U. S., page 8, covering appeals to the Supreme Court of the United States from the Supreme Courts of territories, is as follows:

"Provided, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together wrth the transcript, of the pro-

ceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be in validated by reason of being instituted by writ of error or by appeal."

This act in itself is so clear as to need no construction or discussion. It indicates clearly that a statement of facts of the case in the nature of a special verdict and the rulings of the court on the admission and rejection of evidence "SHALL BE MADE AND CERTIFIED BY THE COURT BELOW AND TRANSMITTED TO THE SUPREME COURT." Now that means that the court below, the Supreme Court of the Territory, and not some other court, shall make and certify this statement of facts.

The Supreme Court may make these statements of facts by the affirmance of findings of fact of the District Court, as was held in Cannon vs. Pratt, 99 U. S., 619-21-22, where the court said:

"When the Supreme Court affirms the judgment of the district court upon findings of fact made by the district court the Supreme Court, in effect, adopts such findings as its own, for the purposes of appeal to this court."

But in the case at bar, the District Court did not make any findings of fact. There was simply the ordinary general finding for the plaintiff. There were no findings of fact in the nature of a special verdict, as Congress has provided "SHALL BE MADE AND CERTIFIED BY THE COURT BELOW" when appeal is taken from the Supreme Court of a territory to the Supreme Court of the United States.

In the case of Hecht vs. Broughton, 105 U. S., 235-236, the Supreme Court, Mr. Chief Justice Waite, said:

"We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and *upon an appeal to the statements of facts and rulings certified by the court below.*"

And in the case of Davis vs. Fredericks, 104 U, S., 618-19, the Supreme Court, speaking again by Mr. Chief Justice Waite; said:

"As such appeals lie to this court only from the Supreme Court of a territory (Rev. Stat. sec. 702), it follows that *the statement both as to facts and rulings, on which we are to act*, MUST BE MADE DIRECTLY OR INDIRECTLY BY THAT COURT."

So that it would seem clear, not only by the plain provisions of the statute, but by the decisions under it, that the statement of facts in the nature of a special verdict must be made by the Supreme Court of the Territory, and the act in question makes it the imperative duty to certify the facts in detail.

Our motion, duly verified in this case, and the record, the transcript certified to this court from the Supreme Court of the Territory of Oklahoma, shows that no findings of facts were made by the District Court, and that there were no special findings in the nature of a special verdict for the Supreme Court of the Territory of Oklahoma to revert to in this case, as it affirmed the judgment of the District Court, and the opinion of the Supreme Court of the Territory of Oklahoma made no findings of fact in the nature of a special verdict, and the opinion of that Supreme Court, which is copied in the motion which we have presented and filed in this case, shows that that court has made no findings of fact which this court will, in our judgment, be willing to accept as a statement of the facts made from the quite voluminous evidence taken in the trial court and certified in the case made, as is the practice in Oklahoma and the Supreme Court of that Territory.

In the case of Stringfellow vs. Cain, 99 U. S., 610, the Supreme Court said:

"It is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the district court."

The court in that case further held in that opinion, that where the Supreme Court of a territory reversed the judgment of the district court because the findings of fact made by the district court were not sustained by the evidence, it was unneccary to go through the circuity of action of sending the case back to the district court to make other findings of fact "in order to put the case in a situation for review in this court." The court further said:

"The district court could do no more than find the facts which, in the opinion of the Supreme Court, should have been found before, and the judgment which should follow from these facts may just as well be settled by the Supreme Court on the first appeal as on the second. We conclude, therefore, that the case is properly here for decision upon the facts stated by the Supreme Court."

And so in this case at bar, although the judgment of the district court was affirmed. yet there were no findings of fact made by the district court which the Supreme Court of Oklahoma could affirm, and so the Supreme Court of Oklahoma must of necessity make a certified statement of facts of the case in the nature of a special verdict, in order that appellants may have this case considered upon the facts which the evidence presents under the April 7, 1874, act herein referred to.

There are a great many other cases in the Supreme Court of the United States where this question had been considered. Among them are:

Idaho Land Co. vs. Bradbury, 132 U. S., 509-514;
Marshall vs. Burtis, 172 U. S., 630-35;
Gray vs. Howe, 108 U. S., 12-13;
Salina Stock Co. vs. Salina Creek Co., 163 U. S., 109-17-18;
Zeckendorf vs. Zeckendorf, 171 U. S., 686;
Cohn vs. Daley, 174 U. S., 539-44-45;
Cameron vs. Pratt, 99 U. S., 619-21-22;
Thompson vs. Ferry, 180 U. S., 484-5;
Stone vs. United States, 164 U. S., 380-3;
Saltonstal vs. Burtwell, 150 U. S., 417-19.

We call the court's especial attention to the cases of Cohn vs. Daley and Thompson vs. Feery, supra, in which cases the court considered so-called statements of facts, which appear to have been deemed by the Supreme Court of Arizona Territory sufficient and as complying with the rule so clearly and unmistakably declared in the 1874 act under consideration, but in which cases this court held such statements of facts not to be a compliance with the statute, and refused to review the cases. We do not wish our clients left in any such position in this case, and in order to avoid such a catastrophe, we have asked the Supreme Court of Oklahoma to make what we believe this court will consider a compliance with the statute, and we are certainly entitled to the statment under these clear decisions of this court.

In the case of Stone vs. United States, supra, this court held that it was not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings and so we claim in this case that even though the opinion in this case may state some of the facts, the most casual consideration of the evidence, which has been certified by the Clerk to this court, will show that the opinion does not pretend to comprehend all the facts of this case, and there are numerous facts proven by the evidence beyond controversy, and which any court exercising a degree of conscience, candor and fairness which all courts exercise, must necessarily find in making the statement of the facts of the case like or in the nature of a special verdict, and it is upon these facts which are established clearly by the evidence, but not found in the opinion of the Supreme Court of Oklahoma, upon which we wish partly, at least, to present the law under our assignments of error in this case.

We would be more than willing, if the law permitted, to submit this case to this court upon the same record upon which the case was submitted to the Supreme Court of the Territory of Oklahoma, but we feel confident, under the de-

cisions of this court, that we cannot ask this court to review the evidence submitted in the case made from the district court of Logan County, Oklahoma, to the Supreme Court of the Territory of Oklahoma, and to make its own findings of fact therefrom. This court has frequently declined to do this, under the 1874 act, and while the practice in Kansas, from which Oklahoma took its present code, and therefore in Oklahoma is to incorporate into the case made all of the evidence instead of requiring the trial court to make findings of fact and conclusions of law separately, that practice is not permitted in this court, and therefore we are required to present to this court the facts of the case in the nature of a special verdict, or of special findings of fact, and it being by this appeals act the imperative duty of the Supreme Court of the Territory to make this statement of facts and the Supreme Court of the Territory having refused and declined to make this statement of facts, we must of course present our application to this court for an order upon the Supreme Court of Oklahoma to perform the duty enjoined upon it by the 1874 act. Our motion and the proof in support thereof shows that we have done all in the Supreme Court of Oklahoma that we can do. We have courteously and respectfully requested that court to make this statement of facts and certify it to this court. If this court should now deny our relief, it would be equivalent, in this case practically, to denying our right of appeal at all from the Supreme Court of Oklahoma.

We very respectfully suggest that the ground upon which the Supreme Court of Oklahoma has based its refusal to grant our application for this relief is untenable. A perusal of the opinion of the court, which we have certified in our motion and which is printed in the printed motion, when considered in the light of the assignments of error made and filed in this cause for a review of the decision of the Supreme Court of Oklahoma Territory, shows that the

Fifth. Because said court erred in ruling and deciding that under the contract sued upon by J. T. Nelson, appellee, in his suit against the appellants in this cause, some affirmative act was necessary on the part of the appellants in order to exercise their election. under their optional contract, not to purchase the property, the subject of the contract.

Sixth. Because said court erred in ruling and holding and adjudging that the failure of the appellants to return the property the subject of the contract in controversy, on or before the time stipulated, the 4th of March, 1901, bound them to the payment of the balance of the price fixed under said contract, of forty-five hundred ($4,500.00) dollars.

Seventh. Because said court erred in holding that said contract required appellants to return property on the 4th day of March, 1901, and that because of their failure to return said property they were to be held liable for the balance of the price stipulated in the contract; whereas, the court should have held that such failure entailed upon them the forfeiture of the earnest money paid upon said contract, and as therein provided.

Eighth. Because said court erred in finding and holding these appellants liable to the appellee for the sum of money sued for, solely because of their failure to return the stock, records and seals of said corporations on the 4th of March, 1901; whereas, there is nothing to show that on or after the 4th of March, 1901, the said appellee ever demanded or requested the return of said property, and the undisputed evidence does show that the same was returned and sent to the said J. T. Nelson shortly after said date, and he refused to receive the same.

Ninth. Because said court erred in ruling and holding that in

the contract sued upon in this cause in the courts of Oklahoma, there is an express provision giving plaintiffs in error there, appellants here, the right to rescind, and that right is a mere option of the party, in this: That said holding and decision shows that said court misconstrued said contract and took the wrong theory thereof, and held that a recission was necessary to relieve appellants from the payment of the sum stipulated, forty-five hundred ($4,500.00) dollars; whereas, their mere failure to meet the terms of the contract to pay the sum of forty-five hundred ($4,500.00) dollars would, by its terms, relieve them from further liability, but entail a loss and forfeiture upon their part, of the five hundred ($500.00) dollars paid on said contract.

Tenth. Because said court erred in its ruling and decision that under the contract sued upon by appellee in this cause, it was the duty of the appellants to return or offer to return the property, and to give notice of their disaffirmance of the contract, and to return said property to the appellee at some other place than the place where appellants received it, to-wit, at the city of Guthrie.

Eleventh. Because said court erred in ruling and holding that it was the duty of appellants under the contract sued upon in this case, to elect to rescind said contract and to notify the appellee (defendant in error in the Oklahoma court) of such election, and to return or offer to return to the place from which they received it, all of the certificates of stock, books, contracts, seals and other paraphernalia pertaining to the property and business and that because of such failure, they became liable for the remainder of the purchase price under said contract, to-wit, the sum of forty-five hundred ($4,500.00) dollars, with interest thereon.

Twelfth. Because said court erred in ruling, holding and adjudg-

ing that the judgment entered by the district court of Logan county, Oklahoma Territory was correct and in affirming said judgment.

ARGUMENT.

I.

THE SUPREME COURT OF OKLAHOMA ERRED IN HOLDING THAT IT WAS NECESSARY FOR THE APPELLANTS TO NOTIFY NELSON THAT THEY ELECTED NOT TO PURCHASE THE STOCK THEREIN PROVIDED FOR, AND TO RESCIND THE CONTRACT AND TO HAVE TURNED BACK THE STOCK ON WHICH THEY HELD AN OPTION TO PURCHASE, ON OR BEFORE MARCH 4, 1901, OR THEY WERE BOUND TO PAY THE $4,500 SUED FOR.

We think the learned Supreme Court of the Territory, as well as the trial court, fell into error in failing to take a correct view of the contract, which was the basis of the action. The contract was not for a sale and transfer of the stock. It was simply one wherein the parties on the one hand contracted for a right to purchase, and on the other, for the consideration named, agreed to waive the right to sell the stock to other persons until after the expiration of the time named in the contract. This is what is said in effect in such contract:

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: * * * * A payment of $500 is to be made in cash upon delivery of the above named property, and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March 1901. * * * The $500 above men-

tioned is to be earnest money to be forfeited in case the balance of payment is not paid. * * * *"

It will be observed that the language quoted makes no mention of a sale of the stock. Neither are there any words which imply an intention to purchase at a future date, or any agreement to so purchase. "The $500 is to be considered an option;" and further, "The $500 above mentioned is to be earnest money to be forfeited in case the balance of payment is not made." There is no ambiguity in this language. The parties paid $500 for the privilege of buying the stock within a certain time. There being no sale of the stock, or agreement of sale, it follows that the title to the stock after as well as before March 4, 1901, remained in Nelson, defendant in error.

The petition upon which a right of recovery is claimed is based entirely upon the theory that because appellants failed to notify Nelson of an election not to purchase the stock prior to the expiration of the time named in the contract therefore in contemplation of law a purchase was made. It is not claimed that a return of the stock was demanded before or after the suit was instituted. And there is no denial that on April 1, before this suit was instituted, this stock was sent by express to Nelson at Fort Smith, Ark., and he refused to receive it. (Pp. 66-67.) The case was brought and tried upon the theory that because appellants failed to notify Nelson of their election not to take they bound themselves as purchasers of this stock. The Supreme Court of the Territory, in deciding the case, state that: "The right of the plaintiff below to recover being based upon the theory that the defendants below had failed to turn back to Nelson the property delivered to them, therefore under the contract were bound to pay the remainder of the contract price of $4,500." (See opinion, p. 170.)

It will not be questioned, from a reading of the decision, that the Supreme Court based its decision upon the theory as above stated; and this shows that the court, in dealing with the case, was fundamentally wrong in its construction of the contract. This misconception of the contract is further set forth in the opinion in the following language on page 171:—

"The uncontradicted evidence shows that this contract was for the purchase of certain mining stocks of coal companies operating or to be operated in the Indian Territory. At the time of the contract, the plaintiffs in error, or some of them, owned certain interests in these companies or some of them, and desired to obtain a controlling interest, and in order to do so, contracted to purchase a certain amount of the stock from the defendant in error which would give them control of the property and of the company."

And also on pages 174-175:

"In this case, the contract was for a sale of the mining stock mentioned and described therein. The delivery of the property, together with the payment of $500 completed the contract, and transferred the title to the plaintiffs in error, subject, however, to the right of plaintiffs in error to exercise their option either of paying the remainder of the purchase price, or of rescinding the contract and returning the property. The right to return the property was a condition of the sale. It was a condition subsequent, the performance of which would have rescinded the obligation of plaintiffs in error to pay the purchase price. The performance of the option to return was subject alone to their election. The plaintiff below had no power whatever to prevent or effectuate it. It could only be performed by the voluntary act of the plaintiffs in error. If they failed to perform it, the conditions were discharged, and the promise to pay became absolute. Some affirmative act was necessary on their part in order to complete the recission. That is to say, the contract required them to return the property. The word "return" is very readily understood, and the plaintiffs in error could only be relieved from the obligation to return the property either by some act of the defendant in error or by some condition making it impossible

to comply with the terms of the agreement. Stevens vs. Hertzler, (Ala.) 19 So. 838."

The above quotations contain the two most important paragraphs of the opinion of the Supreme Court of Oklahoma and the only authority cited in support thereof. A careful review of that case and of the earlier case in Alabama therein referred to shows that the authority cited does not support the court's conclusion.

In the Stevens vs. Hertzler case it appears that on January 16, 1894, the plaintiff entered into the following contract with Hertzler and others:

"State of Alabama, Madison County. Know all men by these presents that: Whereas, we, Henry P. Turner, John Hertzler, Jr., James R. Stevens, Jr., William Burritt, and H. & C. L. Toney, a partnership composed of Harris Toney and Charles L. Toney, all of the county and state aforesaid, are desirous of selling our respective and separate holdings of the stock of the Hagey Hospital Association of Texas, a corporation duly organized and incorporated under the laws of the state of Texas; and whereas we each own forty-nine (49) shares of said stock, of the par value of one hundred dollars each: Now, therefore, this instrument witnesseth that for and in consideration of the sum of ten dollars to us in hand paid by James R. Stevens, of the county and state aforesaid,and for divers other and valuable considerations, we do hereby covenant and agree with, and obligate ourselves to, the said James R. Stevens, his heirs and assigns, that we will, at any time within three months from the date of this agreement, sell, transfer, and deliver to the said James R. Stevens our respective shares of the stock in the said Hagey Hospital Association of Texas, a corporation duly organized and incorporated under the laws of the state of Texas, as aforesaid, at and for the agreed sum of twenty-five and 92-100 dollars per share. In the event the said James R. Stevens should not avail himself of the option within the time specified, then these presents are to be void, and all parties hereto are to be discharged from any liability on account thereof. Given under our hands and seals this 8th day of January, 1894. H. P. Turner. (Seal.) Jno. Hertzler, Jr. (Seal.) J. R. Stevens, Jr. (Seal.)

H. & C. L. Toney, for 25 shares. (Seal.) H. & C. L. Toney, for 24 additional shares, if satisfactory to W. F. Baldridge. (Seal.) W. H. Burritt. (Seal.)"

The opinion also shows that on January 16, 1894,

"The plaintiff, under the contract above set out, sold and delivered to the defendant forty-nine shares of the capital stock mentioned in the contract above set out, and thereupon the defendant executed and delivered to the plaintiff an instrument in writing, in words and figures as follows: 'Huntsville, Ala., January 16th, 1894. Received of John Hertzler, Jr., (49) forty-nine shares of the capital stock of the Hagey Hospital Association of Texas, to be paid for as per terms of a contract duly signed by said Hertzler, Jr., dated January the 8th, 1894, or the said 49 shares of stock to be returned by me to said Hertzler within the time specified in said contract. J. R. Stevens. Witness: Erskine Mastin.'"

It also appears that the defendant retained the stock and failed to return it, as he had agreed, and also failed to make payment of the purchase price of the stock. It will be observed at a glance that there are clear distinctions between the contract made by the two instruments in that case and the one at bar, the principal ones being, first: in the contract at bar, there was a mere delivery of the stock with no contract to "sell, transfer and deliver" the stock. Second: that while there was an option in the first agreement of January 8, 1894, as in the case at bar, there was no option in the consummated agreement of January 16, 1894, but the stock was received under the option given the party in the first agreement, and a positive agreement made to pay the purchase price, or return the stock. And, third: there was no provision in that contract, as in the case at bar, fixing the damages, penalty or forfeiture to be paid for failure to elect to pay the balance of the purchase price. The court, in the opinion, say as a basis for their decision:

"The delivery and acceptance of the stock having no other attribute

than an election by the defendant to exercise the option, and performance —by plaintiff—of the agreement, the necessary import of the last agreement is that defendant did exercise the option; and, upon his promise to pay, time for payment, as shown in the agreement."

But there was no such election made by the parties in the case at bar. They never did exercise their option to take, by receiving the stock and making an agreement to pay therefor, as in that case. It is true there was an agreement to pay or return, but concerning it the court there said:

"It is true the promise was to pay or return the stock within the given time. Most obviously, the right to return was a mere condition of a sale."

But in the case at bar there was no sale. There was a mere option, never exercised, to take the stock, and there was also the express agreement that "the $500.00 above mentioned is to be earnest money to be forfeited in case the balance of the payment was not paid." So that the very contract fixed its own penalty for failure to make payment, and that was a forfeiture of the $500 which was paid to Nelson as a consideration for this option. The failure to make payment was by the express terms of the contract equivalent to an election not to take the stock, but instead thereof, to forfeit to Nelson the $500 paid. And in distinguishing that case from the case of Wailes vs. Howison, 93 Ala., 375, the court said:

"Here, the promise to pay was made in consideration of the new and independent act of delivery of the stock to the promisor, subject to be discharged by his affirmative act of returning the stock, within the stipulated time."

Thus showing that the court meant that if the case rested upon the first contract, with no exercise of the option to take the stock, there would

have been no obligation upon the defendant to pay for the stock. The court there expressly say:

"The case is unlike that of Wailes v. Howison, 93 Ala., 375. There the delivery of the options, as they were called, was a part of the option to purchase itself. The provision to pay, or return the options, within thirty days, was considered in connection with other stipulations of the contract, notably, the provision that, 'if the said A. P. Howison, or his assigns shall pay or cause to be paid to the said Wm. E. Wailes the sum of ten thousand dollars, within thirty days, then all the rights which are possessed by said Wailes, by reason of said option, shall accrue to, and said options become the property of said A. P. Howison, and, upon the whole contract, its construction was that, to render it binding upon Howison, he must have made known his election to exercise the option within the designated time, unaffected by the fact that he had possession of the options.'"

Thus showing that the court was not to any extent or in the slightest degree, intending to modify the rule of law as declared in Wailes vs. Howison, and showing also that the fact of possession of the stock by the defendant and the failure to return it, as in the Wailes-Howison case could not be held to be an elcetion to keep, to purchase, and to pay for the stock under the optional contract.

The contract in Wailes vs. Howison was as follows:

"This indenture witnesseth, that for and in consideration of one hundred dollars in hand paid, the receipt of which is hereby acknowledged, Wm. E. Wailes has delivered Allen P. Howison the following mineral right, or options to land, viz., N. C. Blake, A. F. Blake and M. J. Blake, two hundred and twenty acres of land; P. Wallace, D. Wallace and M. P. Wallace, to two hundred and twenty acres; M P. Wallace, eighty acres; John Lowery and Jane E. Lowery, to two hundred and twenty acres; F. S. Lightsey, two hundred acres; said mineral rights all in the county of Bibb and State of Alabama; upon consideration that, if the said A. P. Howison, or his assigns, shall pay or cause to be paid to said Wm. E. Wailes the sum of ten thousand dollars

($10,000), within twenty days, then all the rights which are possessed by said Wailes, by reason of said options, shall accrue to, and said options become the property of said A. P. Howison, or his assigns, the said Wailes in no wise being responsible for warranty of titles, or further payment to former owners or landlords. And the said A. P. Howison hereby obligates himself to pay to Wailes the sum of ten thousand dollars, or to return to said Wailes the within described options, within thirty days from this date. Dated January 31st, 1887."

That contract is practically identical in its purpose in substance with the case at bar, excepting there is no provision in it, as there is in the case at bar, clearly declaring that the failure to pay the amount expressed as the price of the stock should be held an election to forfeit the money advanced and paid for the option. So far as the provision with reference to pay for or return the stock, the two contracts are practically identical. The provision in each is:

Wailes-Howison contract.

"And the said A. P. Howison hereby obligates himself to pay to Wailes the sum of ten thousand dollars, or to return to said Wailes the within described options, within thirty days from this date. Dated January 31st, 1887."

Guss-Nelson contract. (Record page 17.)

"The $500 is to be considered an option on all of said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand, five hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered to him."

The two contracts are thus substantially the same, except in the case at bar, and, as before suggested, there is, in addition, the clear declaration that the failure to pay the price of the stock on the day

turn over 25 per cent of the capital stock of the following coal companies located in the Creek Nation, to-wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons, U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal. The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above named companies, the seals and other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property, and additonal property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand, five hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above mentioned 25 per cent of the capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered by him under this contract as follows:

Sapulpa	1210 shares
Choctaw	369 shares
Catoosa	369 shares
Wewoka	369 shares
Red Fork	369 shares
Neyaka	368 shares
Concharty	369 shares
Tulsa	319 shares
Car Creek	369 shares
Broken Arrow	369 shares

The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign and Guss or some one else be elected to fill the vacancy.

U. C. GUSS.
W. H. GRAY.
J. W. McNEAL.
F. H. GREER.

J. T. NELSON."

On the 6th day of April, 1901, J. T. Nelson brought suit in the District Court of Logan County, Oklahoma Territory, to recover the $4,500, the alleged balance of purchase price of this mining stock under this contract, with interest from the 4th day of March, 1901. (p. 15.) This suit was brought on the theory that the defendants were indebted to Nelson in the sum of $4,500 as the balance of purchase price for the stock under this contract, and that they were liable therefor because the defendants had failed to return the stock, seals and other corporate records to Nelson on the 4th day of March, 1901. (Petition p. 16; opinion of the Supreme Court of Oklahoma p. 170.)

The defendants demurred to this petition of the plaintiff in the trial court and this demurrer was overruled and exception taken. (p. 18.) Answer was filed by defendants in three paragraphs, first; a general denial; second, alleging the exercise of the option not to take the stock on or before March 1, 1901 and the sending shortly thereafter of this stock to plaintiff at his last-known post office address, Ft. Smith, Ark., and his refusal to receive it; and, third: that the contract was entered into on account of the fraudulent representations of the plaintiff Nelson. The case was tried to the court without a jury (p. 27), and judgment rendered for the plaintiff Nelson on Feb. 19, 1903, in the sum of $4,500, together with interest from March 4, 1901 to date of judgment, amounting to $616.87, making a total judgment of $5,116.87. (p. 163.) This judgment was affirmed by the Supreme Court of Oklahoma on Sept. 2, 1904, and appeal and proceedings in error therefrom lodged in this court Nov. 19, 1904. The judgment of the Supreme Court of Oklahoma shows that the right of plaintiff to recover was based upon the theory that defendants below had failed to turn back to Nelson the property delivered to them, and therefore under the contract, were bound to pay the remainder of the contract price, and that the con-

tract was a conditional sale contract with the right of the defendants to rescind the obligation, and if they failed to rescind it on or before March 4, 1901, the promise to pay became absolute, and under this theory they were held liable for this $4,500 and interest. (Opinion pp. 170-176.)

The evidence in the case is somewhat voluminous, but from it, undisputedly appears that this written contract was made at the Guthrie National Bank in the city of Guthrie, Logan County, Oklahoma Territory. (p. 36.) Nelson at that time resided in Ft. Scott, Kansas, and came from there to Guthrie at that time. (pp. 36-120-121.) At the time of the contract Nelson was secretary of these stock companies. (pp. 121-122.) Nelson delivered the stock mentioned in the contract to these four parties at the Guthrie National Bank, Guthrie, Oklahoma, at the time the contract was made, and resigned the office of secretary, and shortly thereafter sent the seals and other records of these companies to Guthrie, and Mr. U. C. Guss was elected secretary in his stead. The stocks and records and seal were kept at the Guthie National Bank. (pp. 36-40-84.) These four parties had, before that time, become the owners of one-fourth of the stock in each of these ten mining companies (p. 28), and J. W. McNeal was treasurer thereof (p. 29), and subsequent to May 28, 1900, J. W. McNeal as treasurer of these companies received royalties, as the money was called, amounting to $500 by March 4, 1901. (pp. 41-53.) This money was divided by McNeal among these several parties, but without any dividend ever having been declared by the corporation. (pp. 42-53.)

There is not the slightest evidence or claim that these option holders ever decided to or elected to purchase this stock under their option, but on the contrary, it clearly appears that they determined before the 4th of March, 1901, not to exercise the option to take the stock, and

were ready and willing to turn it, and all the seals, books, etc., of these companies back to Nelson. (Evidence of McNeal, p. 57, U. C. Guss p. 76-92, W. H. Gray p. 82, Frank H. Greer p. 84.)

On Feb. 25, 1901, J. T. Nelson wrote J. W. McNeal from Ft. Smith, Arkansas, with reference to this option, (p. 37) and on Feb. 27, 1901, McNeal wrote Nelson in answer thereto (p. 38) a letter which indicated this stock would be returned to Nelson, and just before the 4th of March 1901, it was determined not to take this stock, and John D. DeBois, an attorney for these parties, was directed to notify Mr. Nelson of their election not to take this stock, and that the stock, papers, etc., would be returned to him (pp. 58-75-76), and on March 3, 1901 Mr. DeBois wrote and mailed at the Guthrie, O. T. postoffice a letter to this effect and that the certificates, papers, etc., were at the Guthrie National Bank for him, to Mr. Nelson at Ft. Smith, Arkansas, and the same day sent Mr. Nelson a telegram to the same effect to Ft. Smith, Arkansas (pp. 64-65), from which point Mr. Nelson had been in correspondence with these parties on this matter. This letter was put in an envelope with Mr. DeBois' return card on it, but was never returned. This was apparently not received by Nelson, as he on March 29, 1901, wrote a postal card (p. 66) to John D. DeBois at Guthrie asking "why do you not let me hear from you," referring to this matter, but there is no denial that they were sent. On April 1, 1901, this stock was sent to Mr. Nelson at Ft. Smith, Arkansas, by express. (p. 66.) This Mr. Nelson refused to receive, but on April 6, 1901, began this suit and on April 17, 1901, wrote a letter to Mr. McNeal from Ft. Smith, Ark., to Guthrie, Okla., advising McNeal that he, Nelson, had refused to receive the stock. (p. 67.) The evidence does not disclose the slightest proof of any demand ever having been made by Nelson upon any of these parties Guss, Gray, McNeal or Greer on or after March 4, 1901, for the return of this stock,

selves to purchase it. We think if the territorial courts had kept the distinctions in mind which are properly in the case, no trouble whatever would have resulted. Nelson would have received back his stock and kept the $500, and that would have restored the parties to the position contemplated in the contract upon appellants' failure to elect to take the stock.

Jo. Gordon vs. George W. Swan and H. M. Kollock, 43 Calif., 564, appears a case where the stockholders and owners of a *mine assigned* their stock to some parties in trust, to be turned over to persons who took an option upon the mine and agreed to make certain improvements in the mine within a specified time, and in which the parties undertaking further agreed:

"To pay * * * to the parties of the first part, by paying the same to the said trustees for them, the sum of fifty thousand dollars at the end of six months from the time this agreement is signed and possession of the mine taken;"

and further agreed to make two additional payments of fifty thousand dollars each at intervals of six months. It was then agreed that a forfeiture of money paid, etc., should attend a failure to take the stock, as in the case at bar, the forfeiture clause being as follows:

"If the parties of the second part fail to fulfill any of the agreements herein contained to be by them performed, they shall forfeit whatever improvements they may have made in and about the mine, and all moneys paid in accordance with this agreement, etc."

Further, the opinion of the court, in construing the contract, states:

"We think it is very evident that this amount was to form the consideration for the purchase of the stock, which, if purchased, would, by the action of the Board of Directors, result in a conveyance of the mine to the defendants. It was a device by which the defendants could acquire the title to the mine, and the stockholders could receive their

several proportions of the purchase money directly, and without the trouble and delay of the proceedings for its distribution which the statute would otherwise require.

"It cannot be claimed that it was the true import of the contract that this large sum of money was to be paid for a brief possession of the mine, or for the privilege of erecting furnaces and testing the value of the ore. It was intended as the purchase money of the property itself, and it is substantially as if the contract had been made with the corporation instead of the stock holders.

"The contract contains no obligation on the part of the defendants to purchase the stock. On the contrary, it seems to be clear, from the terms of the instrument, that the purchase should be at defendant's option. * * * * The contract provided for a peaceable possession of the mine by the stockholders in case of defendant's failure to perform, and a forfeiture of all moneys paid or improvements made by them. It was one of a class of contracts common among miners, by which the mine owner gives to another person the privilege of prospecting the mine for a certain time, and the option of purchasing at a fixed price, or perfecting the improvements made by him. The defendants by their failure to pay the first installments of the purchase money, exercised their choice and so lost the privilege of purchase, and forfeited their improvements; but did not become liable for the amount which, by a reasonable construction of the instrument, they were to pay only in the event of their election to consummate the purchase and receive the title to the mine."

The court there concluded that the defendants, by their failure to pay the first installment of the purchase money, exercised their choice and lost the privilege of purchase, and forfeited their improvements, but did not become liable for the amount which by a reasonable construction of the instrument, they were to pay only in the event of their election to consummate the purchase and receive the title to the mine.

How different, indeed, is that conclusion upon a contract similar to the one at bar, for there the Supreme Court of California determined that:

"Their failure to pay * * * * exercised their choice, and so lost the privilege of purchase, * * * *; but did not become liable for the amount,"

of the agreed price of the optional contract. While in the case at bar, the Supreme Court of Oklahoma held:

"If they fail to perform it, the conditions were discharged, and the promise to pay became absolute. Some affirmative act was necessary on their part in order to complete the rescission."

This, we again suggest, is the pith and essence of this case, and the Supreme Court of Oklahoma has misconstrued the meaning and force of such option, or else the Supreme Court of Alabama and the Supreme Court of California have done so, for the holdings of these high courts are exactly opposite in the interpretation of such contracts, and the weight of reason, equally with the unanimity of authority, is against the Oklahoma construction; and with a proper construction of this contract, and one which we present to the court, the plaintiff of course cannot recover; for unless the construction placed upon it by the Supreme Court of Oklahoma is sound, the plaintiff has manifestly no cause of action against the defendants in the trial court, for his cause is based purely upon the proposition that by a failure to notify plaintiff Nelson of an election not to take the stock and to return the stock to him, Nelson, at some other place than that at which it was delivered, on or before the option day, these defendants became liable to pay the amount agreed upon as the balance to be paid if they elected to purchase the stock.

The Supreme Court of Alabama and the Supreme Court of California say that the failure to pay is an exercise of their choice not to take, rather than to take, the stock or mineral rights described in the options, and this, we believe, is the sound interpretation to be given such contracts.

So, too, here we show that the contract itself, providing, as it does, for the option of purchasing at a fixed price the failure upon the part of appellants to exercise their choice simply resulted in a loss to them of the privilege of purchasing, and forfeited the sum of $500, the agreed amount to be paid in case they failed to elect to purchase the stock. But by this they did not in any manner become bound for the payment of the $4,500.

We think under the law the appellants should be considered the bailees of the stock, not the owners, or as having any ownership interest in the property. They had never agreed to become the purchasers, never contracted to do more than forfeit a sum of money. The possession of the property therefore was a mere bailment, to be terminated when their right to purchase expired. Suppose for instance after appellants had failed to purchase the stock, it had become very valuable. Can it be contended that they would still have had the right to purchase the stock subsequent to the expiration of the time named in the contract? Unquestionably Nelson could have refused to sell under such circumstances, and might have brought an action to recover the stock, or its actual value, no matter how great such value may have been. This being true, does it not follow that no sale, either *in praesenti* or contingent, occurred at the time of the execution of the contract, and does it not further follow that if no sale or agreement to sell is in the contract, appellants became the bailee of this stock, and if bailees, surely they may not be charged and held as purchasers.

Sargent vs. Gile, 8 N. H., 325, from the syllabus:

"Where one receives goods upon a contract, by which he is to keep them a certain period, and if in that time he pays for them he is to become the owner, but otherwise he is to pay for the use of them, he receives them as a bailee, and the property of the goods is not changed until the price is paid."

Luddon & Bates Southern Music House vs. Dusenbury, 27 S. C., 464, we find a case where the distinction between bailment and sale is set forth and wherein the court lays down the rule that a contract or instrument under consideration must be the guide in determining whether personal property placed in the possession of other parties is a sale or bailment. From the opinion:

"Looking, then, to the language employed, it would seem that they could not well have used stronger language than was employed to express an intention to make a contract of hiring. The transaction is so characterized in express terms throughout the whole instrument, and there is not a word in it that indicates, in the remotest degree, that the parties contemplated a sale until we come to the last paragraph, and then the language used clearly imports not an intention to make a *present sale* —but simply an intention to give Franks *an option* to buy at some *future* time, if he shall *then* desire to do so."

Streeper vs. Williams, 48 Pa. St., 450, from the syllabus:

"Where a hotel owner agreed to sell it for $14,000, of which $3,000 was to be paid at a specified time, when a deed was to be signed; part possession to be delivered immediately, and in the contract, the parties agreed to forfeit $500 in case either failed to comply with its terms; Held, that the forfeiture was intended by the parties as a compensation to either in case the other wholly abandoned the contract; and that it was liquidated damages and not a penalty."

The contract in this case was not a sale of the stock, but rather for the sale of an option or right to purchase the stock. The fact that the parties agreed in the contract to pay prior to the time named therein an additional sum of $4,500, or in lieu thereof, to turn back the stock, is fully explained in its purpose by the subsequent language, which reads: "The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid."

This latter clause fully explains the intention of the parties at the

time the contract was entered into. The contract is a forfeiture contract, and we think can be construed as nothing else, and it follows, if it be a forfeiture contract, it is to be most strictly construed against Nelson, the beneficiary under such contract. And the contract itself having provided just what should happen in the event of the failure of the parties to elect to purchase the stock, we believe the Supreme Court of the Territory was wrong in holding that Nelson had the right to claim that the parties, at the time they entered into the original contract, had agreed to pay the $4,500 in case they failed to elect within the time named in the contract. Looking at this contract from this standpoint, it will be seen that Nelson, by his action, is doing more than to simply claim the right of forfeiture of the $500. He is undertaking to enforce the sale of the mining stock, a thing which was not agreed upon in the contract. This we claim he may not do.

The evidence in this case shows that the appellants undertook to notify Nelson before the expiration of the contract of their intention not to purchase, and the evidence further shows that very shortly after the expiration of the time named in the contract, they forwarded the stock to Mr. Nelson, and he refused to accept the same, thus showing that the appellants were not seeking an unfair advantage under their contract.

II.

APPELLANTS HERE, DEFENDANTS IN THE TRIAL COURT, WERE NOT REQUIRED, UNDER THE CONTRACT, TO DELIVER OR TENDER BACK THE STOCK, SEALS AND RECORDS TO THE PLAINTIFF, J. T. NELSON, AT FT. SMITH, ARKANSAS, OR ANY OTHER PLACE THAN GUTHRIE, OKLA.,

ON MARCH 4, 1901, WHERE THEY WERE READY THEN, AND EVER SINCE HAVE BEEN, TO DELIVER THESE ARTICLES TO PLAINTIFF NELSON.

If the court should construe this contract to be other than a mere option on the part of the defendants to purchase this stock on the 4th of March, 1901, then we contend that they have complied with its terms. There is no question but that they have been ready and willing ever since the 3rd day of March, 1901, to turn back the stock and paraphernalia received from Nelson to Nelson. They determined by that day not to purchase this stock and not to pay the $4,500 provided for in the contract, but to return the stock, etc., to Nelson. This is the clear proof in the case and is absolutely undenied, but the court took the theory that they were bound to return the stock, seals, etc., to Nelson at Fort Smith, Ark., or wherever he might happen to be that day, and if they did not do so, they were bound to pay the $4,500. This, we contend, is not the law. The contract did not stipulate where they were to turn back to Nelson the property delivered by him. Nelson delivered the stock, the seals and the records to the defendants at Guthrie, Okla. Nelson delivered nothing whatever under this contract to these defendants at any other point, and we contend they were entitled to deliver back this property back to Nelson, when delivery was required, at the place where they received it. Nelson was not a resident of the territory of Oklahoma. He was, or at least had been, at Fort Smith, Ark. He had written Mr. McNeal from that point on February 25, 1901, and requested that the stock, etc., be sent to him by freight. (Page 37.) His various other communications were from the same point. (Pages 65-66-67.)

On March 3, 1901, J. D. DeBois, who was acting for the defendants,

wrote a letter and sent a telegram addressed to Mr. Nelson at Fort Smith, Ark., advising him that the certificates of stock, etc., which he had turned over to the defendants, were at the Guthrie National Bank for him, and that the parties would not pay the $4,500. The sending of this letter through the postoffice in due course, and this telegram to Mr. Nelson, both at Fort Smith, Ark., is not disputed. The parties had had correspondence with Mr. Nelson immediately before this at Fort Smith, Ark., and certainly had good reasons to suppose that he was there at that time. Such notice, therefore, sent to him within the time required by the contract, was all that defendants should be held bound to do in order to give notice of their election not to purchase the stock. They were not bound to go away from the place of the contract and go out of the Territory and personally hunt up Mr. Nelson to either give him notice of their election not to take the stock, if any notice at all were required, and to tender the stock and corporate paraphernalia to him in person.

The general rule of law applicable to a case where one is bound to make payment is a very old one and laid down by Littleton, Section 304, (2 Coke upon Littleton, 55) as follows:

"If no place of payment of money be specified, the party is bound to seek the person to whom it is due, if within the realm; but if he be out of the realm, this dispenses with the tender and no rights are lost by the inability to make it."

In commenting upon this rule, the Supreme Court of New York, speaking by Nelson, Chief Justice, says:

"The true meaning of the text and commentary, I apprehend, applies to the case where the party to whom the money is to be paid has no residence in the kingdom. If he has a residence, it would be agreeable to the understanding of the parties to the contract that the tender should be made there, as it is but reasonable to presume some compe-

named is to be attended with a forfeiture of the $500 then paid. No terms could have made the contract more clearly one of a pure option with a forfeiture of the money advanced, upon the failure to elect to take; and the penalty for failure to exercise the option to take was not, as the Supreme Court of Oklahoma say, that the defendants should be held for the payment of the $4,500, but simply should be held for a return of the stock—a thing never demanded by Nelson, and always ready to be performed by the defendants.

The Supreme Court of Alabama, in the Wailes vs. Howison case, in construing the contract set forth therein, has shown why an action for the recovery of the sum agreed upon will not lie in case the parties having the right fail to make the election within the time agreed upon. The reasoning of the court appears to us to be without fault. In the opinion, after setting forth the contract, it is said:

"The contract, the foundation of the suit, being in writing, its construction is a matter of law for the court. * * * It is insisted by appellant that the contract is one of 'sale or return.' The bargain called 'sale or return' has been defined to be a 'sale with a right on the part of the buyer to return the goods at his option within a specified time, or, when no time is specified, within a reasonable time.' Moss vs. Sweet, 16 Q. B., 493; Benjamin on Sales, 442. To make a bargain of "sale or return," it is indispensable that there be a sale. As a general proposition, in order to constitute a sale, there must be a delivery of the thing sold, with the intention of passing the "title," and it is contended that the indorsement of the options at the time of their delivery were intended to and did pass the legal title to the transferee, and constituted a bargain of 'sale or return,' leaving in the grantor the option to return within thirty days.

"Mr. Story lays down the rule, that, in all cases where credit is not given, or where the delivery is not intended by the parties to be abso-

lute, a mere parting with the goods will not of itself constitute an absolute delivery." Story on Con., sec. 804. The written indorsements of the options, without condition, passed the title; and if the transferee, with the evidence of ownership and title in his possession had sold the option to third innocent parties for a valuable consideration, no doubt the purchasers would be fully protected; but the principles of law applying for the protection of innocent third persons can not be invoked by a grantee against his grantor. As between the grantee and grantor, their respective rights depend upon contract between them, and the contract must be so construed as to effectuate the intention.

"Construing the contract as between parties themselves, do the indorsements, when construed with the agreement, show a sale and delivery of the mineral right and options for ten thousand dollars, which the purchaser had the option to annul, or rescind upon condition subsequent, by a "return," or do they show that the payment of the ten thousand dollars was a condition precedent to a sale, and that the transfer was the agreed price of the mineral rights, and the sale was concluded at that price, the question arises, for what consideration was the one hundred dollars in cash paid? If the parties intended the transaction to be a bargain of sale, by which the title passed, what force and effect is to be given to the following provision of the contract: "For and in consideration of one hundred dollars in hand paid, Wm. E. Wailes has delivered the following mineral rights or options to land, viz, * * * upon the condition that , if the said A. P. Howison, or his assigns, shall pay or cause to be paid to the said Wm. E. Wailes the sum of ten thousand dollars, within thirty days, *then* all the rights which are possessed by said Wailes, by reason of said option, shall accrue to, and said options *become* the property of A. P. Howison. There can be no doubt that this provision of the contract makes the payment of the ten thousand dollars a condition precedent, and as between the parties a sale of the mineral right and options was not intended, until its payment; for it is expressly provided that "then" upon the payment of $10,000) the mineral rights *shall become* the property of Howison."

"The payment of one hundred dollars was a sufficient consideration to uphold the purchase of the option for twenty days, and during that

time Wailes could revoke or rescind the offer of sale. During the twenty days it was optional with Howison, either to purchase the mineral rights by paying the ten thousand dollars, or decline the purchase. He had paid one hundred dollars for this privilege. A mere failure alone to pay within twenty days terminated his optional rights, and Wailes then could have compelled him to deliver up the option contract. It did not require a 'return' to invest the right in Wailes. * * * *

"The contract nowhere uses the word *sale*, or any term or statement of facts equivalent to a sale. * * * * It is clear the parties did not intend by the transaction that the title to the mineral rights and options should pass so as to make it a sale, except upon the payment of the ten thousand dollars as a condition precedent; and which understanding and intention would prevent the transaction from being a bargain of 'sale or return.' The obligation to pay ten thousand dollars, or return the options within thirty days, did not extend the time within which Howison had the option to purchase. The agreement had definitely fixed this time at twenty days, and there is no provision for an extension of the twenty days to thirty days.. * * * *"

"The contract cannot be construed as extending the offer to sell for thirty days, or that the transfer and delivery of the mineral rights and options was intended to operate as a sale without the payment of ten thousand dollars as a condition precedent, or that the transaction was a bargain of 'sale or return' without overthrowing and disregarding the clearly expressed meaning and words of the agreement.

"Looking at the entire contract, we are satisfied that the parties never intended, and the contract is not, an absolute promise to pay ten thousand dollars as a bargain of 'sale or return,' or as liquidated damages for failing to return the options within thirty days."

Not only then, it seems to us, is the authority which the Supreme Court of Oklahoma gives as the one support for its decision not against us, but its reasoning is actually in our support; and that authority also cites the Wailes-Howison case which we have now reviewed, and which clearly and fully supports our claim with reference to the interpretation of this contract.

The contract under consideration and interpretation in Wailes vs. Howison was exactly like the contract in the case at bar in all the essential particulars of the Alabama contract, and these likenesses appear in the following particulars:

First. Each contract fixed a stipulated price at which the mineral right in the one case and the stock in the other, could be purchased.

Second. A sum was paid down at the time of making the contract which, in the Alabama case, was construed to be the price of the option, and in the Oklahoma case is declared to be forfeited if the option is not exercised by payment of the stock.

Third. The contract is an optional one, giving to the party an option to purchase or not by a stipulated time.

Fourth. The optional contract relates to mineral rights in land in the one case and to stock whose only value lies in mineral leases in the other.

Fifth. There was an actual delivery over of the mineral right in the one case, of the stock in the other with the option, at the option of the contemplated purchaser.

Sixth. There was a contract in each case to pay the agreed amount by a stipulated day, or to return the mineral right or option in one case or the stock in the other.

These points of identity in the contracts covering all the essential features of them, a decision in one case should in the absence of no safer authority (and none has been cited in this case), be controlling in the other. The Supreme Court of Oklahoma has not undertaken in its decision to say that the decision in Wailes vs. Howison is not good authority for this case. It has simply misconstrued this optional contract,

and declared it to be a contract of conditional sale, which the authorities show clearly it is not, and then declared that we have failed to exercise the condition under which we could rescind the sale, when there was no sale made, and no contract which required recission, in order to prevent a binding obligation upon the holder of the option, but rather a contract which required an affirmative exercise of an option to take in order that the option holder might be transformed into a purchaser of this stock. In our judgment, this case of Wailes vs. Howison is conclusive upon this case.

The evidence could not, of course, vary the terms of the contract, as the contract is plain in its terms, and no testimony was offered for the purpose of attempting to change any of its provisions, and therefore we presume the court meant to, or should have stated only its conclusions as drawn from an inspection of the contract itself. It is very evident, therefore, that the Supreme Court of the Territory, in construing the contract, had in mind the idea that the sale of the stock was agreed upon in the contract as there must have been an agreement which would bind as purchasers in order to warrant the judgment.

In order to present clearly the distinction we have in mind, we suggest that in dealing with sales or transfers of property of the character under consideration, there may be, first: a sale of the stock; second: an agreement to sell; and third: what is generally termed an option by which, for a consideration, one party agrees that another may at some future date purchase. This distinction is very clearly set forth in Ide vs. Leiser, 24 Pac. (Mont.,) 695, as follows:

"The first is the actual transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescissions or release

may occur by which the contemplated sale never takes place. The third, an option, originally is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land, he does not then agree to sell; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, *in praesenti*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands, if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflations of prices, perhaps of great value. A contract must be supported by a consideration whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract; that is to say, the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred *in praesenti* as a piece of personal property instantly delivered on payment of the price. * * * * " (Citing numerous authorities.)

Applying the principle therein stated: When the contract in this case was entered into, there was an executed contract. The stock was not sold, because such was not the agreement, but the option to sell was purchased. After March 4, 1901, Nelson owned the stock as absolutely as if the option contract had never been executed. He could have demanded the stock and recovered possession thereof. Upon failure, after demand, to turn the stock back, he could have maintained an action for conversion, and if the appellants had disposed of the stock, he could have recovered a judgment for its value. The stock was his; it had never been sold, and appellants did not in any manner bind them-

The court can readily see that the reasons which dispense with the necessity of a tender of money out of the state are more forcible in the case of property. Suppose it were a heavy iron safe which was to be delivered and suppose that the promisee were in Greenland or in the heart of Africa. There being no place named in the contract where the property was to be delivered, would it be contended that the promisor must carry the safe to Greenland or Africa for the purpose of tendering it to the promisee? In such a case it would be practically impossible, and in any event the expense of making a tender of this kind would be many times greater than the value of the property. Of course it would not be so difficult to make a tender in an adjacent state, but in this class of cases it is necessary to have a rule and the law has made the rule to be as stated above. There are many cases in which a rule of law does not apply with absolute perfection to every case that can arise, but as the courts have often said, it is better to have a rule which is plain and easy of application even though it may not in all cases work ideal justice, than it is to have a more ideal rule which it is difficult or impossible to apply. Judge Story said: "The law aims at practical good rather than theoretical perfection." If the rule be fixed that parties are not obliged to go out of the state to make a tender, the rule is plain and easily understood and parties can accommodate themselves to it, and if it be desired that a delivery or payment be made at some point out of the state this can be provided for in the contract. The difficulty of a rule under which it might be conceded that a person need not be followed into the wilds of Africa but which required that the party should be followed to some reasonable distance, would be that there would be no way of determining what would be considered a reasonable distance. In other words, you could not draw the line. In one case, the court might hold that it would be reasonable to make

a tender to a person at a certain point, and in another case of the same character, another court might hold that it would be unreasonable. The rule would thus be so uncertain that it would be the same as no rule at all. No one would be able to tell what the law was. The decisions of the courts would become mere guess work. It is laid down as a maxim that it is of the utmost importance that the laws be fixed, definite and certain, so that parties can advise themselves thereof and govern themselves accordingly. Another consideration which we may suggest is this: It is a general rule that the laws of a state have no extra territorial effect, and it is only reasonable to demand that if a party should avail himself of a law, he should bring himself within the operation of the law. That is, if he would have the law operate in his favor, he ought also to bring himself under the operation of the law. He ought not to put himself in a position where the law cannot reach him and at the same time demand that the law operate in his favor. The law has never shown a disposition to favor persons who keep out of reach. If a person desires any relief at the hands of a court it is required that he come in and subject himself to the jurisdiction of the court.

We have suggested that both reason and authority support the rule suggested above. We have cited authorities and also discussed the reason of the thing and we submit that the rule stated is plainly supported by both reason and the authorities.

We may now mention a case from the Supreme Court of Maine which suggests a slight modification of the rule. We have no hesitation in citing this decision for two reasons. In the first place, so far as the modification is concerned, the entire weight of authority and reason is against it; and in the second place, it happens in this case that we are

within the modification suggested. It was held in this case that "A person is not obliged to follow another out of a state to make a tender; a reasonable effort to ascertain his residence and give him notice is sufficient." Howard vs. Minot, 20 Me. 330.

The latter part of this holding is opposed to the general, or rather, the entire current of authority. Just why a person should make a "reasonable effort" to do a thing when he is not required to do the thing itself is not very apparent. The rule laid down by the other authorities that the place where a contract is made is presumed to be the place of performance, no other place being specified, is much more reasonable. If a contract is to be performed at a certain place the party entitled to the performance ought to be there so that performance can be had. It is impossible to turn property over to a person at a particular place if he is not there to receive it. It is a rule that the law does not require a vain thing, also, that the law does not require an impossible thing, and in a case where a thing cannot possibly be done on account of the absence of a party, it seems unreasonable to require the other party to do anything more than to be ready and willing to do his part. There can be no question whatever that where no place is fixed for the performance of a contract the law presumes that it is the place where the contract is made. In this case the place would be Guthrie. If we analyze the proposition it simply comes to this: A contract is to be performed in Guthrie. Two parties must be present in order that the contract may be performed, first the party who is to make the performance, second, the party to whom the performance is to be made. If the latter is not present, either in person or by an agent, performance is impossible. If the other party is present, ready and willing to perform, that is sufficient. It is not his fault that the other party is not present. It is the duty of the other party to be present. If money is

to be paid or property delivered and the party who is to make the payment or delivery, is present, with the money or property, this is enough. If a contract is to be performed in Guthrie (and that is the effect of the decisions as applied to this case) why should the promisor be obliged to go outside of Guthrie to make performance? This would be to require him to do something which is not provided in the contract. It will thus be seen that if we reason the rule out, it is found narrower in its scope than as stated above. It seems to us that if this were an original question, the hard logic of the case would require a rule such as we have just indicated. But whatever the rule from a strictly logical standpoint may be, and however far a person must travel to tender performance in a state, it is certain, under the authorities, that he need not go out of the state, and this is sufficient for our purpose. We have made these latter suggestions with a view of showing that the modification of the rule suggested by the Supreme Court of Maine is not sound. But even if it be conceded that the modification is sound, it is our contention that we are within the modification.

III.

TIME OF TURNING BACK TO NELSON OF THE STOCK, CERTIFICATES AND STOCK PARAPHERNALIA RECEIVED BY DEFENDANTS WAS NOT OF THE ESSENCE OF THIS CONTRACT, AND SUBSTANTIAL COMPLIANCE WAS MADE, AND IS ALL THAT WAS REQUIRED.

Section 850 (p. 219) of the Statutes of Oklahoma of 1893, provides:

"Time is never considered as of the essence of a contract unless by its terms expressly so provided."

There is nothing in this contract which provides that the particular day, March 4, 1901, was made of the essence of this contract, so far at least as the time of turning back the stock to Nelson was concerned. That date was probably the last date on which the defendants had to elect to take the stock, and their failure to elect to take the stock on that day was equivalent to a determination not to purchase it, and thereby under the terms of the contract, they forfeited the $500 which they had paid, and thereafter they could neither get back the $500 nor acquire the stock by their election to purchase, without the consent of Nelson. They had that entire day in which to make their election to take or not to take the stock, but there is nothing in the contract which indicated that the turning back of the stock certificates and the paraphernalia delivered with it on that very day was of any particular importance. There is not a single scintilla of evidence in the record which shows that the failure of the defendants to send the stock by freight or otherwise to Mr. Nelson at Ft. Smith, Ark., until April 1, 1901, entailed any damage to Nelson, or that the stock in the meantime had become depreciated.

It clearly appears from the evidence that the leases upon these mining lands in the Indian Territory were absolutely invalid, and that the Indian Agent had given notice to the parties interested that if they attempted to mine any coal upon any of these leases, except perhaps upon the Tulsa lease, that they would be arrested, (p. 76), and it would appear that the mining of the coal on the Tulsa lease, or rather, upon a very small portion of it, was done by sufferance. There is, therefore, nothing to show that Nelson was in any way prejudiced by the fact that the stock was not shipped to him until the 1st of April, 1901, or that he was in any way prejudiced by the delay in the defendants' delivery of the same to him by their shipment at that time, if they were

in fact required, which we contend they were not, to deliver this stock or the paraphernalia therewith at any place other than Guthrie, Okla. There was, however, in any event, a substantial compliance with any obligation which this contract can be construed to have made upon them to return the stock and property received under the contract to Nelson.

In the Kansas case, supra, the court referred to the elementary rule that the law only requires a substantial compliance with a contract and held that where a lessor was out of the state at the time that rent should be paid to him, a tender of the rent when he returned to the state was sufficient and was a substantial compliance with the contract. In the present case the defendants really went out of the way to perform. They held the property here ready for delivery if the planitiff should appear. He did not appear. This ,under the authorities was all that they were required to do. But to show their good faith, a little after March 4th, they forwarded the property to the plaintiff at Ft. Smith, Ark., and he refused to accept it (record pp. 67-135). They were not obliged to do this, but if there was any obligation at all in the premises we think this would be, like the tender of rent in the Kansas case, a substantial compliance with the contract. They waited until the time expired to deliver the property here. The plaintiff not appearing to receive it as he ought to have done, they sent it to him and he refused to accept it. He made it impossible to perform the contract in Guthrie where it should have been performed, and declined performance anywhere else. It seems to us that plaintiff should not now be heard to complain.

Furthermore, Mr. Nelson himself did not insist upon March 4, 1901 as being the only time at which the stock, books and seals therewith should be delivered back to him. On March 29, 1901, he wrote to Mr. John

D. DeBois, who was representing the defendants, a postal card from Ft. Smith, Ark., saying: "Wire me if you are not going to be here on the first. Signed, J. T. Nelson." And he explained his meaning in writing this card on page 133 as follows:

"Q. Now then, this card here, dated April 1st, I will ask you what you meant by this "

"A. I meant I wanted you to wire me if you did not want to take the stock."

So that it would appear that Nelson himself was not insisting at the time that March 4th was the day, and the only day, upon which this stock could be returned, or upon which he would receive it, but that even as late as March 29th he was willing for the parties to exercise the option to take this stock, and was willing for them to return the stock if they elected not to take it. They had already made this election and had written and telegraphed him to that effect, and if he did not get the letter or the telegram, he was advised shortly thereafter that the stock had been sent to him, and on April 17, 1901, he wrote to J. W. McNeal, one of the parties, the following letter:

"Office of J. E. Marshall, Real Estate and Loan Agent,

"No. 8, N. Seventh St.

"Ft. Smith, Ark., April 17th, 1901.

"J. W. McNeal, Esq., Guthrie, Okla.

"Dear Sir: I received word today that you had sent the stock. The same will remain in the office subject to your order as I will not accept it.

"Yours truly,

"J. T. NELSON."

So that in any event Mr. Nelson had this stock where he could have received it at his own place of abode, and where he declined to receive it shortly after the 4th of March, 1901.

As to the question whether the seal and books of the corporation were tendered back to Nelson, we think that was of little, if any, importance. Nelson had resigned his position as secretary of the corporation, and there is no evidence that he was, after March 4, 1901, and prior to April 17, 1901, re-elected to this position; and if he had not been re-elected, it would not have been appropriate to have delivered these articles to him. Mr. U. C. Guss had been elected secretary, and was then secretary of the corporation, and under the law he was the proper custodian of these records until some other person was elected secretary. Had Mr. Nelson received back the certificates of stock when sent to him at Ft. Smith, and become qualified to receive the position of secretary of the corporation, and made demand upon Mr. Guss for the seal of the corporation and these books, and Mr. Guss had refused, none of which is shown in this case, there might be some question as to whether, in this respect, the defendant Guss, or in fact any of the defendants, had declined in good faith to deliver back any of the articles received from Mr. Nelson; but in the absence of such a showing by Nelson, and there is no pretense of any such facts being presented in this case, the failure to turn back or to tender back these books, records and seal of the corporation must have little bearing upon this case.

IV.

THE RETENTION OF ROYALTY.

The retention of the royalty by the defendant McNeal as treasurer of these corporations is immaterial here. The Supreme Court of Oklahoma, in its opinion, expressly declined to determine as to whether or not it was the duty of these defendants, plaintiffs in error there, to return the income from the royalty from the Tulsa mine. It does not

tent person has been left to transact the business. * * * It would be a most inconvenient and even impracticable rule, besides liable to great abuse by the party to whom the money is due, to exact in all cases where no place is mentioned, a tender personally."

Smith vs. Smith, 25 Wend. 405

In Allhouse vs. Ramsey, 6 Whart. (Pa.) 331, the court say:

"Where the place of payment is not designated, the money must be tendered wherever the creditor is found within the realm; but the debtor is not bound to go out of it to seek him. Coke, Littleton, 210 b. The rule of the civil law is narrower still, it being said that payment must be made at the *place where the contract was made, unless it appear by express provision or necessary inference, that another place was intended.* 3 Burges Confl. 882. As then, there was no stipulation about place in this instance, the debtor was not bound to follow his creditor to Pennsylvania, which as regards transactions of this nature, stands in the relation to other states as a foreign country, a principle decided in Buckner vs. Finley, 2 Peters, 587."

In Hale vs. Patton, 60 New York, 236, the court says:

"In general, a debtor who is indebted on a money obligation, is bound, if no place of payment is specified in the contract, to seek the creditor and make payment to him personally. But this rule is subject to the exception that if the creditor is out of the state when the payment is to be made, the debtor is not obliged to follow him, but *readiness* to pay within the state in that case will be as effectual as actual payment to save a forfeiture."

The same rule was announced by the Supreme Court of Minnesota. "The rule at common law was that if no place was appointed for the payment of money, if the person to whom the money was due was out of England, the debtor was not obliged to go out of the realm to make him a tender." Bacon's Abdgt., Tender, C. "Under the manifest good sense of this rule, the plaintiff was under no obligation to make a tender to the defendant in North Carolina." Hill vs. Bradley, 21 Minn., 20.

In Tasker vs. Bartlett, 5 Cushing 359, the Supreme Court of Massachusetts held:

"Where the condition of a bond was that if the obligee within one year from date of the bond, should elect to reconvey to the obligor an estate, which the obligor had previously conveyed to the obligee and should give the obligor notice, in writing, of such election, then the obligor, within sixty days thereafter, should pay to the obligee a certain sum of money and deliver up to him certain promissory notes, on tender by him of such conveyance; and the obligee, within the time specified, having made his election to reconvey and given the obligor notice, in writing, went to the house of the obligor with a deed of conveyance, duly executed, but did not tender the same in consequence of being informed by the wife of the obligor that he was out of the commonwealth, and such obligor was then, in fact, out of the commonwealth; it was held that such absence of the obligor was sufficient to excuse the obligee from any further effort of performance on his part; that he was not bound to make inquiry whether the obligor had authorized an agent to act for him in his absence and that it was the duty of the obligor to appoint an agent to act for him in his absence and perform the condition on his part, and to give notice thereof to the obligee."

In the opinion, the Court, after stating the general rule, say:

"We think, also, that he was bound to give notice to the plaintiff of the appointment of an agent; upon the well founded principle that where one party has knowledge of a material fact not known to the other party, he is bound to give notice of it. The plaintiff, therefore, was not bound to make inquiry of anyone whether the principal defendant had authorized an agent to act for him in his absence."

In Jones vs. Perkins, 20 Miss. 139, (64 Am. D. 136) the Court held:

"The presumption of law is that a contract is to be performed at the place where it is made if no place of performance be specified."

In the opinion the Court say:

"The note in this case was made at Jackson, Miss., and the pre-

sumption of law is that it was to be paid there, as no other place of payment is named. The debtor, according to the authorities, was not obliged to go out of the state to make payment."

The early case of Wilmouth vs. Patton, 5 Ky. 280, contains as good a discussion of the rule as we have seen. The rule appears to be so well settled that most of the authorities simply state it and pass on. The court refers to an earlier case in which the rule had been declared, and says:

"The principle established in the case of Chambers vs. Winn, is thought strictly applicable to this case, and independent of the influence of that case as a precedent established, the decision itself appears to be founded on good reason, consonant to justice and intrinsicly correct."

The Supreme Court of Kansas has adopted the same rule. The action involved a lease in which it was provided that if the rent were not paid at the time stated, the lease should be forfeited. The lease named no place of payment and the lessor resided out of the state. The court said:

"The lease is silent as to the place where the rent should be paid as it became due. It must be presumed then that the parties intended that it should be paid at the place or at least in the state where the leased property was situated. The tenant could not be expected to go out of the state to hunt up the lessor and tender the rent. This would be asking too much of him, in fact requiring him to attend to that which should be the care of the lessors.

"We think that the case most clearly shows that it was the fault of the plaintiffs that the rent was not paid nor offered to be paid until four or five days after it fell due and that the defendant did pay the rent or offered to pay it on the first opportunity (as soon as the lessor arrived in the state). A substantial compliance with the terms of an agreement, or performance of a condition, is sufficient and when non-performance of a condition by one party is ocasioned by the act of the other party, it may be excused."

Burns vs. McCubbin, 3 Kas. 215.

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This case is on all fours with the cases from New York and Massachusetts supra. The Massachusetts court held that if the promisee were not in the state and had left no agent to represent him that the promisor was not obliged to make any inquiry; and that if an agent had been appointed, the promisee should have given notice of it. And the court held that as the defendant was out of the state, and had left no agent to represent him, or, at least, had not notified plaintiff of the appointment of any agent, that this, in effect, prevented a tender, and that in such a case, a willingness to perform was equivalent to a tender. In many of the cases the promisee has evaded tender by designedly keeping away (see cases cited in 5 Cush. 363) but the Massachusetts court held that it was immaterial what the intention was if the promisee was not present; the effect was the same; a tender would be excused; willingness to perform was equivalent to an offer to perform and there could be no forfeiture in such a case.

The New York case is precisely in point. After stating the usual rule, the court say:

"But the performance of a condition of a bond or other obligation is excused by the default of the obligee, or his absence, when his presence is necessary for the performance, or when by his act of omission it can be said that he prevented a performance."

The court will note that the authorities make no distinction between cases where a party designedly or fraudulently absents himself and cases where he is absent without any special design. If a contract involving a delivery or tender is to be performed at a place it cannot be performed unless both parties are present in person or by proxy. If one party is not present he thereby prevents performance, and he ought not to be heard to complain because something was not done which would have been done had he been present. The general rule is stated by Mr. Schouler as follows:

"The general maxim which courts apply to conditional contracts is that one party who would hold the other bound, must show that he has fully performed to the letter every condition precedent which the contract by its terms puts upon himself, save only so far as the other party had waived or prevented performance of such condition."

Speaking of this exception, Mr. Schouler says: "As to the exception above mentioned, which grows out of the opposite party's own acts or conduct, it is clear that an obstruction of performance which renders one's act of performance impossible, puts the obstructing party at fault and renders him liable for the consequences. Hence as it is tersely stated the performance of a condition precedent by the plaintiff which had been rendered impossible by the defendant's *neglect or default* is equal to performance."

2 Schouler Per. Pr. 281-282.

Where a contract is to be performed at a particular place, as a delivery of property, we do not think the promisor would be justified in sending the property away to some other place. He ought to keep it at the place of performance so that if the other party appears he can perform. He might by this means disable himself to perform and might put himself in default. The other party might appear to receive the property and he might have legal cause to complain if the property were not there ready to be turned over to him.

There is no injustice in the presumption that a contract is to be performed at the place where it was made. If some other place be preferred it is an easy matter to so provide. It is a much more natural inference that property is to be turned over where it is than that it is to be carried somewhere, and in actual practice, it is almost always the case that property is delivered at the place where it is. While the language employed in the following extract from Schouler's Personal Property is not in all respects applicable to the facts in the present case, we think the principle involved is clearly implied.

"As to the place of delivery the law presumes a delivery of chattels to have been intended at the place where they were when the bargain was completed; and the seller should be ready to perform accordingly. To quote Chancellor Kent: 'If no place be designated by the contract the general rule is that the articles sold are to be delivered at the place where they are at the time of sale. The store of the merchant, the shop of the manufacturer or mechanic, or the farm or granary of the farmer at which the commodities sold or deposited are kept must be the place where the payment or delivery is to be made, when the contract is to pay upon demand, and is silent as to the place.' Such being the state of things, it is not encumbent upon the seller to take the goods from place to place in search of the buyer; nor indeed would it be prudent thus to expose the property to hazard and increased expense. * * * Sometimes the seller holds himself ready *by the express term of the contract* to send the chattels to the buyer's address; and if this appears to be designated the seller must be ready to make appropriate delivery; but if the buyer fail to designate the place at which he desires delivery made, as he ought in any contract of this kind, the seller performs his duty so as not to be liable for breach by having things ready on his own premises awaiting information."

1 Schouler Per. Pr. 385.

Mutatis Mutandis this language applies exactly to the facts in the case at bar.

In the cases cited above it was money that was to be tendered, but this fact was merely incidental. It was the law of tender that was under consideration. It is not material what the thing is that is to be tendered excepting that if there is any difference, there would be less obligation to tender property out of the state than money.

In Patterson vs. Jones, 13 Ark., 69, it was property that was to be tendered and the court announced the same rule as is above stated.

"Where no place of delivery is named in the contract, the law fixes it at the residence of the party who is to make the delivery."

Patterson vs. Jones, 13 Ark. 69.

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In The

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1904.

U. C. GUSS, J. W. McNEAL, W. H GRAY, AND FRANK H. GREER,
Appellants.

vs.

J. T. NELSON,
Appellee.

No. ~~184~~ 124.

BRIEF OF APPELLEE.

ON MOTION FOR CERTIORARI.

W. P. DILLARD,
OF COUNSEL

W. R. BIDDLE,
GEO. S. GREEN,
ATTORNEYS FOR APPELLEE.

The Monitor Binding & Printing Co., Fort Scott, Kas.

In The

SUPREME COURT

of the

UNITED STATES

U. C. GUSS, J. W. McNEAL, W. H GRAY, AND FRANK H. GREER, *Appellants.*

vs.

J. T. NELSON, *Appellee,*

No.....

BRIEF OF APPELLEE.

The appellants by their motion for certiorari and diminution of the record present a question of importance to this court. That question briefly stated is: Should the Supreme Court require the Supreme Court of Oklahoma Territory to prepare from the records and case-made a statement of facts in the nature of a special verdict and certify the same as a part of the record?

There is no claim that the trial court was ever requested to make a statement of facts or conclusions of law as might have been done under the laws of the Territory. There is no claim that the appellants ever requested the

Supreme Court of Oklahoma to prepare such statement previous to taking the appeal to this court. There is no claim that they sought to have such statement made and made a part ot the records of the Supreme Court of Oklahoma so as to be certified with the balance of the record to this court.

Now the facts are that the Supreme Court of the Territory of Oklahoma by its order made on the 11th day of January, 1905, refused to make such statement. (Page 38 of Motion). And in such refusal stated their reason which was: "That the opinion rendered in this case sufficiently states the facts therein."

This perhaps was not the only reason for this refusal because there are other matters that the Supreme Court of the Territory may have considered upon the application. Some of these are, that it is almost impossible for an appellate court to make a statement of facts from a printed record. Appellate courts follow the findings of the trial court unless such findings are not supported by the evidence. Appellate courts never weigh evidence where there is a conflict. They take the findings of the trial court as conclusive unless such findings are not supported by the evidence.

This is the rule in all law cases. The trial Judge sees the witnesses, hears their testimony, notes their conduct and can inform himself as an appellate court cannot, of the weight to be given to the testimony of each witness.

Again, this case had been decided and had passed out of the consideration of the court and to make such state-

ment would require a re-examination of the entire record.

So that there are other reasons which evidently influenced the Supreme Court of the Territory of Oklahoma to make this refusal. It is a task almost impossible to perform.

The trial court found all of the issues made by the pleadings in favor of the plaintiff, the present appellee, and the Supreme Court of Oklahoma took that finding as its finding. (Page 7 of Motion.)

The appellee has filed the following motion:

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY and FRANK H. GREER,
Appellants.

vs.

J. T. NELSON,
Appellee.

MOTION TO DISMISS THE APPLICATION FOR CERTIORARI AND DIMINUTION OF THE RECORD

Now comes said appellee J. T. Nelson, and moves the court to dismiss the motion of said appellants for certiorari and diminution of the records for the following reasons to-wit:

1st: The facts stated in said motion and the exhibits thereto attached do not authorize the relief demanded.

2nd. If the Supreme Court of Oklahoma is required by law to perform the duties requested it can not be so required upon a motion of this character.

3rd. The motion filed is not the proper remedy for the relief demanded.

4th. If special findings of fact were necessary they could have been obtained in the trial court upon request of the appellants, the defendants in the court below.

5th. The petition no where shows that there ever was a record in the Supreme Court of Oklahoma such as is suggested in the motion of the appellants.

J. T. NELSON.

By W. R. BIDDLE & GEO. S. GREEN,
Attorneys for Appellee.

TO APPELLANTS:

You will take notice that the appellee has filed a motion of which the foregoing is a copy.

J. T. NELSON,

By W. R. BIDDLE,
Atty. for Appellee.

We accept service of the foregoing motion and notice this 2nd day of February, 1905. Appellee to serve printed brief by Feb. 18, 1905.

FRANK DALE AND A. G. BIERLY,
Attys. for Appellant.

It will be observed that the Supreme Court of Oklahoma is not a party to this proceeding. The record sought to be obtained and certified by the Supreme Court of Oklahoma has never existed and the purpose of this writ is to cause a new and additional record to be made by the Supreme Court of Oklahoma. The Clerk of the Supreme Court of Oklahoma has certified and sent up all of the record that has ever been made in this case.

I

We think the parties have pursued the wrong remedy if they have any remedy whatever. If it is a duty that the Supreme Court of the territory is required under the law to perform, mandamus would be the proper remedy.

"A writ of certiorari being a writ requiring an inferior tribunal to certify up a record will issue as a matter of course if applied for in time, its purpose being to produce what exists in the lower tribunal which through some inadvertence has not been included in the transcript certified up."

Pellatrau vs. Jackson, 7 Wend. 478.

appear that Mr. Nelson has ever demanded or has ever asked for, or been willing to receive this royalty. It was paid, as we have shown, to Mr. McNeal as treasurer of this corporation. It was never disbursed by any order of the corporation, and in contemplation of law, they are still in Mr. McNeal's hands as treasurer of the corporation, to be paid to the holder of these stocks when a dividend is properly declared, and there is no evidence whatever that Mr. McNeal is not entirely responsible, or that there is any danger that the money will not be paid over when the dividend is legally declared by the board of directors of this corporation.

The judgment of the Supreme Court of Oklahoma, we contend, should be reversed and judgment ordered for defendants in the trial court, and they should be held entitled to deliver these stocks to Nelson on his request, and also to deliver to the proper secretary and treasurer of these corporations when elected the seal, books, etc., of these corporations and the royalty received from the Tulsa mine, which we respectfully ask.

Very respectfully submitted,

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellants and Plaintiffs in Error.